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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 464

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, FRETZ-MOON TUBE COMPANY, INC., JAMES M. BARTON, GENERAL ELECTRIC COMPANY, LACLEDE STEEL COMPANY, THE M. B. AUSTIN COMPANY, NATIONAL ELECTRIC PRODUCTS CORPORATION, I. A. BENNETT, REPUBLIC STEEL CORPORATION, SPANG CHALFANT, INC., H. G. MORROW, STEELDUCT COMPANY, TRIANGLE CONDUIT & CABLE CO., INC., and THE YOUNGSTOWN SHEET AND TUBE COMPANY,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF FOR PETITIONERS

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March 12, 1949

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OCTOBER TERM, 1948

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, FRETZ-MOON TUBE COMPANY, INC., JAMES M. BARTON, GENERAL ELECTRIC COMPANY, LACLEDE STEEL COMPANY, THE M. B. AUSTIN COMPANY, NATIONAL ELECTRIC PRODUCTS CORPORATION, I. A. BENNETT, REPUBLIC STEEL CORPORATION, SPANG CHALFANT, INC., H. G. MORROW, STEELDUCT COMPANY, TRIANGLE CONDUIT & CABLE CO., INC., and THE YOUNGSTOWN SHEET AND TUBE COMPANY, *Petitioners,* *against* FEDERAL TRADE COMMISSION, *Respondent*	No. 464

BRIEF FOR PETITIONERS

Opinion of the Court Below

The opinion of the Seventh Circuit Court of Appeals, handed down on May 12, 1948 (R. 3678), is reported at 168 F. (2d) 175.

Jurisdiction to Review

Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1254(1).

Statute Involved

The material portions of Section 5 of the Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717, as amended by Act of Mar. 21, 1938, c. 49, 52 Stat. 111) are as follows (15 U. S. C. § 45):

> "Unfair methods of competition in commerce . . . are hereby declared unlawful.
>
> "The Commission is empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce . . ."

Statement of the Case

This case presents the question whether a seller of conduit may independently make use of a basing-point method of quoting prices for and selling conduit, with knowledge that other conduit sellers are also using that method, but without any agreement, combination or conspiracy to do so, and without discrimination in price which is unlawful under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (herein sometimes referred to as Section 2 of the Clayton Act). The petitioners and the Federal Trade Commission (herein sometimes called the Commission) are in agreement that this question is of far-reaching importance to the entire economic and business structure of the country and has not been, but should be, settled by this Court.

The Commission's Order

This case was instituted by the Commission on January 25, 1941, by the issuance of a complaint (R. 2) against the petitioners and others which contains two separate counts. Count I of the complaint alleges that the respondents* therein named had entered into and were engaged in an unlawful combination and conspiracy to suppress price competition in the sale and distribution of rigid steel conduit (herein sometimes called conduit) by various means, including the use of the basing-point method of quoting prices, and thereby engaged in unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act (R. 14-18). Count II of the complaint does not contain any allegation of agreement, combination or conspiracy, but charges that the mere use by each of the respondents of the basing-point method of quoting and selling conduit, with knowledge that the other respondent conduit sellers are also using the same method, with resultant uniformity of delivered-price quotations in any given market, constitutes in and of itself an unfair method of competition within the meaning of such Section 5 (R. 18-21). In neither Count is there a charge of violation of Section 2 of the Clayton Act; and the Commission expressly disclaimed any such charge at the hearings before the Trial Examiner (R. 1161-62) and in its brief in the court below (Com. Br. p. 23).

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*Whenever in this brief reference is made to "respondents" or to a "respondent", it is to be understood as meaning one or more of the respondents before the Commission, not all of whom are petitioners in this Court. The Respondent in this Court will be referred to as the Commission.

The conclusion reached by the Commission was that the acts and practices of which it had complained in each of the two Counts of the complaint constituted "unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act" (R. 3543) and, on June 6, 1944, the Commission issued an order (herein sometimes referred to as the Order) to cease and desist therefrom (R. 3544-48).

Under Count I of the complaint, the Commission ordered all of the corporate petitioners herein except Spang Chalfant, Inc., to cease and desist from entering into, continuing or carrying out any planned common course of action in respect of quoting or selling conduit at prices determined pursuant to the basing-point, delivered-price system or in respect of any of the other practices complained of (Paragraph I* of the Order, R. 3544-46). Count I of the complaint was dismissed (R. 3548) as to petitioner Spang Chalfant, Inc. and Clifton Conduit Company (a respondent before the Commission), which were thereby determined not to have been parties to the alleged conspiracy.

Under Count II of the complaint, the Commission in Paragraph V of its Order (R. 3547-48) ordered each of the petitioners (including Spang Chalfant, Inc.) and also Clifton Conduit Company to cease and desist

> ". . . from doing any of the following things for the purpose or with the effect of systematically

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*The Order (R. 3544-48) contains seven separate paragraphs (unnumbered but herein sometimes referred to as Paragraphs I through VII, respectively), each beginning with the words "It Is Ordered" or "It Is Further Ordered".

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matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

"(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with, the basing-point, delivered-price system.

"(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

"(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

"(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."

The question now presented to this Court is whether the practices prohibited by the above-quoted portions of Paragraph V of the Order are unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act.

The Facts

Conduit is made from standard steel pipe. It is produced in two types, namely, black enameled conduit and galvanized conduit. Both types are produced in various sizes ranging from ¼" to 6" inside diameter (R. 1117-18, 1710-11; Com. Exs. 53-70, R. 350-55). It is used primarily in building construction as a raceway for receiving and protecting electric wires (R. 677, 1119, 1122). It is a standardized commodity which must meet minimum specifications of, and is subject to inspection by, The Underwriters Laboratories, Inc., which is sponsored by the National Board of Fire Underwriters (R. 677, 1123-27, 2097-98).

The corporate petitioners are sellers of conduit. Eight of them (Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Spang Chalfant, Inc., Triangle Conduit & Cable Co., Inc., and The Youngstown Sheet and Tube Company) manufacture the conduit that they sell (Resp. Ex. 30, R. 1133); the other four corporate petitioners (Clayton Mark & Company, The M. B. Austin Company, Steelduct Company and Republic Steel Corporation) sell conduit made for them by one or another of said conduit manufacturers (R. 803-05, 812-13, 958, 1827). Each of the three individual petitioners is or was an officer of one or another of the corporate petitioners.

Of the ten conduit manufacturing plants which were in existence at the time of the issuance of the Order, six, which produce over 75% of all the conduit produced in the United States, are located either in Pittsburgh or in an area surrounding Pittsburgh from which freight rates to des-

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tinations outside of that area are in general the same as freight rates from Pittsburgh to the same destinations (Resp. Ex. 30, R. 1133). To the west of Pittsburgh are the plants of the petitioner The Youngstown Sheet and Tube Company at Struthers, Ohio, and Indiana Harbor, Ind., and, to the south and west thereof, is the plant of the petitioner Laclede Steel Company at St. Louis, Mo. To the east of Pittsburgh, near Philadelphia, is the plant of Walker Brothers at Conshohocken, Pa. Walker Brothers is the only conduit manufacturer which is not a party to the proceeding in this Court.

Ever since the origin of the domestic conduit industry in Pittsburgh in 1897, conduit has been quoted and sold at delivered prices, although most conduit manufacturers do, upon request, quote and sell on an f. o. b. mill basis (R. 944, 1053, 1229-30, 1414-15). The reason why delivered prices have been used lies in the relative importance of transportation charges from the points of shipment to the points of delivery. Such charges form a substantial part of the cost of conduit laid down at any point which is at all remote from the place of manufacture (R. 1264, 1507, 1875), and purchasers of conduit prefer delivered prices to f. o. b. mill prices, since quotations of delivered prices enable them readily to compare quotations from competing sellers located at different distances from the point of delivery (R. 850, 1509, 1727-28, 2174, 2277-78).

The quotation of delivered prices by means of price lists showing separately the prices for all sizes and types of conduit at all possible points of delivery presents obvious mechanical difficulties. Accordingly, although each of the petitioners has quoted delivered prices, the form of each such price quotation has involved two factors, (1) a

specified dollar amount for the conduit at a specified point commonly referred to as a basing point and (2) a dollar amount equivalent to the freight charges for transporting the desired quantity of conduit from such basing point to the point of delivery. Under the basing-point method of quoting prices for conduit, freight charges remaining constant, a change in the delivered-price quotation is made merely by changing the dollar amount specified for the conduit at the basing point, which dollar amount is sometimes referred to, for convenience, as the "base price".

The demand for conduit at any given location has varied with fluctuations in building activity in that location (R. 1421-22, 1708, 1773, 1897, 2035-36, 2400). In view of such fluctuations and the fact that building activity may be at a high point in one part of the country and at a low point in another part of the country at the same time, every location in the United States of importance from the point of view of building construction has been regarded by each conduit seller as a potential market for its products. Conduit, however, as stated above, is a standardized commodity which generally cannot be sold in any market except at the lowest price at which it is offered for sale by any seller in that market (R. 706, 1265, 1343, 1520-21, 1711, 1757), and because of that fact each prospective seller, in order to sell conduit in any market, must meet that lowest price there. Accordingly, each of the petitioners has regularly quoted conduit for sale in various markets at delivered prices equal to the lowest delivered prices quoted in that market by any of its competitors.*

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*While, for the reasons stated, ultimate uniformity of formal price quotations is normally inevitable, the published list or card price quoted by any seller represents only the seller's price objec-

The conduit plants at or near Pittsburgh—where the industry originated and where, as stated above, even today over 75% of the productive capacity of the industry is located—have always used Pittsburgh as a basing point for purposes of quoting delivered prices. As other manufacturers, with plants located elsewhere than at Pittsburgh, began to manufacture conduit, the delivered prices of the Pittsburgh manufacturers in effect at the time were the prices with which such other manufacturers found it necessary to compete.

Up to about 1924, conduit was generally sold at prices based on Pittsburgh as the sole basing point. In that year, The Youngstown Sheet and Tube Company, then producing conduit at Evanston, Ill., inaugurated the practice of also quoting and selling conduit at delivered prices based on Evanston as well as at delivered prices based on Pittsburgh (Resp. Exs. 178-79, R. 1743). In the latter part of 1934, petitioner Clayton Mark & Company, then producing conduit in Chicago, quoted and sold conduit at delivered prices based on Chicago (R. 914, 1873-5). Since freight rates from Chicago and Evanston, except to certain points in the immediate vicinity, were the same, Evanston shortly thereafter ceased to be used as a basing point for conduit (R. 926-7, 1346; Com. Exs. 53-70, R. 350-55).

The other manufacturers of conduit, of necessity, followed the practices inaugurated by petitioners The Youngstown Sheet and Tube Company and Clayton Mark & Com-

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tive at any time and a substantial part of the sales actually made by the petitioners was made at prices other than card prices (R. 566-9, 622, 679, 686-7, 859-60) with the result that the uniformity of price indicated by price cards has not prevailed in actual sales (R. 3394-5).

pany and also quoted delivered prices for conduit based on Evanston as a basing point beginning in 1924 and on Chicago as a basing point beginning in 1936 (R. 1989-90; Com. Exs. 53-70, R. 350-55). At the time of the hearings before the Commission, each of the respondent conduit sellers quoted delivered prices for conduit based either on Pittsburgh or on Chicago, according as the one or the other base price, with freight from the basing point added, would give the lower delivered price.

The Decision Below

Petitions to review and to set aside the Commission's Order were filed in the Seventh Circuit Court of Appeals in July, 1944 (R. 3556, 3566, 3579, 3610, 3634). After that Court had heard arguments thereon, but before it had rendered its decision, this Court handed down its decision in *Federal Trade Commission* v. *Cement Institute, et al.* (333 U. S. 683) (herein sometimes called the *Cement* case), decided April 26, 1948. Shortly thereafter (on May 12, 1948), the Seventh Circuit Court of Appeals rendered its decision in this case, affirming the Commission's Order and directing the entry of an enforcement decree (R. 3678; 168 F. (2d) 175).

With reference to the issues presented by Count II of the complaint and the corresponding portion of the Order (Par. V), the court below made the following statement in its opinion (R. 3687; 168 F. (2d) 175, 181):

> "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the *Federal Trade Commission* v. *Cement Institute* case, *supra*" [333 U. S. 683 (1948)].

As we pointed out in our brief in support of the petition for certiorari herein (pp. 13-18), that statement discloses that the court below misapprehended the facts in two respects. In the first place, the statement in the opinion that "all parties to these proceedings agree" that the question under Count II of the complaint in this case is identical with that considered by this Court in the *Cement* case overlooks the fact that both the petitioners and the Commission had definitely and positively asserted the contrary to the court below (R. 3691-92).

Furthermore, quite apart from the position taken by the respective parties, the fact is that the differences between the *Conduit* case and the *Cement* case are of vital importance. As we have stated above, the question here presented relates only to Count II of the complaint in this case, which charges that the independent use of the basing-point method of quoting prices by each petitioner—individually and not pursuant to combination or conspiracy—constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. The complaint in the *Cement* case, on the other hand, did not contain any such charge.

The importance to the decision in the *Cement* case of the element of combination and conspiracy was emphasized by this Court in distinguishing (333 U. S. at p. 706) that decision from the Court's earlier decision in *Cement Mfrs. Protective Association* v. *United States,* 268 U. S. 588 (1925), and in disposing of the objections to the scope of the order in the *Cement* case (333 U. S. at pp. 727-29).

In addition to the emphasis placed by the majority of this Court on the element of combination and conspiracy in the *Cement* case, Mr. Justice Burton, in his dissenting opinion, pointed out explicitly that, while the Court in that case held

that there was a violation both of Section 5 of the Federal Trade Commission Act and of Section 2 of the Clayton Act, it

> "has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination of the kind charged by the Commission." (333 U. S. at p. 733)

A petition for a rehearing with respect to Paragraph V of the Order, filed May 27, 1948 (R. 3689), was denied by the Seventh Circuit Court of Appeals without opinion on June 14, 1948 (R. 3703). This Court granted a writ of certiorari on January 31, 1949 (R. 3721), in order that it might review the decree of the court below in so far as it affirmed Paragraph V of the Commission's Order.

Specification of Errors

The court below erred in deciding that each of the following described practices constitutes an unfair method of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, even if each of such practices is employed without any agreement, combination or conspiracy as among the respondents or any of them, and notwithstanding the absence of any charge or finding of any discrimination in price which is unlawful under Section 2 of the Clayton Act:

(1) The independent use by a conduit seller of a basing-point method of quoting delivered prices for conduit and the sale of conduit at delivered prices so quoted.

(2) The quoting or selling by a conduit seller of conduit at delivered prices which systematically reflect the inclusion of a transportation factor that is greater or less than the actual cost of transportation from the point of shipment to the point of delivery.

(3) The quoting or selling by a conduit seller of conduit at prices which systematically differ in terms of mill nets according to the location of the purchasers.

ARGUMENT

PARAGRAPH V OF THE ORDER IS ARBITRARY AND NOT IN ACCORDANCE WITH LAW.

The meaning and effect of the Order in this case have been the subject of a number of statements by the Commission itself and by individual members of and counsel and economists for the Commission, which have been widely publicized.* Such statements have been so conflicting and

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*On May 20, 1948 (eight days after the court below rendered its decision in this case), there was submitted to the United States Senate a resolution (S. Res. 241) that the Senate Committee on Interstate and Foreign Commerce be authorized and directed to "conduct a full and complete inquiry into the impact upon the consumers of goods and upon small and large business in the United States of the decision of the United States Supreme Court rendered on April 26, 1948, in the case of the Federal Trade Commission, Petitioner, versus The Cement Institute and others, and of other recent decisions of such Court and the lower Federal courts construing Federal statutes relating to the regulation of trade practices in interstate and foreign commerce" (94 Cong. Rec. 6312). Pursuant to that resolution, the Senate Trade Policies Committee, a subcommittee of the Senate Committee on Interstate and Foreign Commerce, conducted hearings on June 2 and 4, 1948 and, pursuant to the resolution as amended and agreed to on June 12, 1948 (94 Cong. Rec. 8129-30), continued to con-

have revealed so clearly the wide divergence of opinion even among those engaged in the administration of the activities of the Commission itself that it is impossible to predict what construction the Commission will now place upon its Order in this Court. Thus, while it has been said that "Count II and a corresponding part of the order are frankly directed against the basing-point practice as being, per se, an unfair method of competition, even though not predicated on combination and conspiracy",[1] the statement has also been made that "the Commission has not in a single case challenged the use of the basing-point method of pricing per se separate and apart from collusion"[2]. Again, almost

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duct hearings from November 9, 1948 to a recent date (herein sometimes referred to as the Hearings). The members of the Commission, several of its counsel (including its Associate General Counsel who argued this case in the court below) and others of its employees were called to give testimony at the Hearings. In addition, members of the Commission, such Associate General Counsel and others of its employees have made many addresses throughout the country regarding the meaning and application of the decisions in the *Cement* case and in this case with reference to the basing-point method of quoting prices for and selling heavy products such as conduit, and releases regarding the testimony so given and the addresses so made have been widely distributed and published. A transcript of the Hearings before the Senate Trade Policies Committee and numerous documents relating to the inquiry of the Committee (including a number of such addresses) has been printed by the Government Printing Office in three separate volumes. We hereinafter cite such record as Sen. Com. Pr. I (Hearings on S. Res. 241, June 2 and 4, 1948), II (Hearings on S. Res. 241, Nov. 9-30 and Dec. 6-8, 1948) and III (Hearings on S. 236, Jan. 24-26 and Feb. 18, 1949).

References to, and excerpts from, many of such addresses are collected in the Report of the Advisory Council to the Senate Trade Policies Committee, 81st Cong., 1st Sess. (Jan. 15, 1949).

[1]Commission's Brief in court below, p. 64.

[2]Ewin L. Davis, Commissioner (Sen. Com. Pr. III, p. 24).

immediately after the decision of the court below, a member of the Commission stated flatly that "I believe that freight absorption is out"[3]; another member of the Commission, however, has expressed it to be his understanding that "the Commission has not challenged freight absorption per se"[4]. Similarly, although the Order has been frankly described as "requiring f.o.b. mill pricing"[5], three members of the Commission have been reported as still understanding that it was not "the practical effect of the Commission's Order in the Rigid Conduit case to require f.o.b. mill selling in that industry"[6]. As a result, there has been created among business men and the public at large, widespread confusion as to the precise meaning and effect of the Order.[7] Indeed, in a letter dated March 2, 1949, to Senator Johnson, Chairman of the above-mentioned Senate Trade Policies Committee

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[3]Lowell B. Mason, Commissioner, Remarks Before Marketing Club, Graduate School of Business Administration, Harvard University, May 14, 1948 (Sen. Com. Pr. II, p. 447).

[4]Ewin L. Davis, Commissioner (Sen. Com. Pr. III, p. 24).

[5]"Allen C. Phelps, Assistant Chief Trial Counsel and Chief of Export Trade Division (Sen. Com. Pr. III, p. 65).

[6]"Response [by Commissioners Ewin L. Davis, Garland S. Ferguson and William A. Ayres] to Questions Addressed to Commissioner Davis by Chairman of the Subcommittee on Trade Policies of the Interstate and Foreign Commerce Committee of the Senate" (Sen. Com. Pr. III, p. 269).

[7]See Report of the Advisory Council to the Senate Trade Policies Committee, 81st Cong., 1st Sess. (Jan. 15, 1949), pp. 2-6; Editorial, New York Times, Mar. 5, 1949, p. 16, columns 2-3.

For a further statement of the "Confusion Among Members of the Federal Trade Commission and Its Staff", see pages 46 to 58 of the Interim Report on Study of Federal Trade Commission Pricing Policies Pursuant to S. Res. 241 (80th Congress) and S. 236 (amendment) and S. 1008 (81st Congress), Committee Print, Senate Trade Policies Committee, March 11, 1949 (hereinafter referred to as Senate Trade Policies Committee Interim Report).

(copies of which have been distributed by the Commission), Commissioner Mason, in disagreeing with the views expressed by the Secretary of the Commission "by direction of the Commission" in a letter to Senator Johnson dated March 1, 1949 (copies of which were also distributed by the Commission), regarding Senate Bill S. 1008, introduced by Senator Myers, said (Sen. Com. Pr. III, p. 338):

> "I believe the testimony before your Subcommittee shows widespread confusion as to what the law is with respect to the practices embraced in Senator Myers' Bill. This confusion and conflict of opinion exists not only among businessmen but amongst lawyers, economists and Government officials as well.
>
> "I do not believe the uncertainty has been dispelled by the policy statements approved by a majority of the Commission."

In view of such conflict of interpretation, it is essential at the outset, in considering the legality of the Order, that the precise nature and extent of its prohibitions be understood.

1. Paragraph V of the Order Prohibits each of the Petitioners, by the Use of a Basing-Point Method of Pricing or Otherwise, from Competing With Any Other Conduit Manufacturer in any Market in Which Such Other Manufacturer Has a Freight Advantage.

It will be observed that the prohibitions contained in Paragraph V of the Order are not qualified by any preamble such as the preamble to Paragraph I (R. 3545), limiting the prohibition to acts done pursuant to a "planned common course of action, understanding, agreement, combination

or conspiracy". On the contrary, "each" of the respondents named therein is ordered to cease and desist from doing any of the things specified in the lettered subparagraphs of Paragraph V, subject only to the provision that such things be done

> "for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers."

Although that provision is, in form, stated as a condition to the application of the cease and desist order to the practices specified in the lettered subparagraphs of Paragraph V, it does not have any practical significance, because the purpose and effect therein described are lawful and, therefore, their presence or absence cannot affect the legality of such practices.

It is fundamental that trade is carried on for individual gain. The incentive of each businessman is to make that gain as large as the circumstances will lawfully permit. Ordinarily, he desires, and properly so, to get as high a price as possible for his products. To that end, he must know his competition, and, if he is to succeed in his business, he must know what his competitors are doing. He cannot ordinarily sell his products, particularly if they are standard products, at prices higher than those of his competitors for like products. His competitors, however, are similarly unable to sell at prices which are higher than his. Consequently, he has learned from experience that he cannot normally sell at prices lower than those of his competitors because, if he should attempt to do so, his competitors

would also thereupon reduce their prices accordingly, thereby eliminating the sales advantage attaching to a lower price. In so far as concerns the effect upon his business, therefore, the only result of his charging prices momentarily lower than those of his competitors would be to reduce his margin of profit.

The large concern has salesmen throughout the country whose duties are not only to solicit orders for its products at authorized prices, but also to keep, and to keep the home office, fully informed as to what is going on in their respective localities, to know the prices at which other competing concerns are offering their products for sale there and to secure orders in such localities for their employer at prices as high as those of the competitors. To do that they must do what the Commission calls matching prices. If they quote prices for the products delivered at points where the purchasers desire to have them, they are matching delivered-price quotations with their competitors—other concerns which offer like products for sale in the same localities.

Moreover, those are the regular every-day practices of business concerns in selling their products; hence their acts and practices are "for the purpose and with the effect of systematically matching delivered-price quotations with" other concerns in the same line of business; and, if the delivery costs are different as among different purchasers, then the purpose and effect of such acts and practices are "producing the equivalent of such matched delivered prices through systematic discriminations [*i.e.*, differences] in the mill nets received on sales to different purchasers."

It will hardly be denied, we believe, that we have thus in simple terms described the regular manner in which business is regularly done in this country. Nor will it be denied,

we believe, except by the Commission in its further attempt to impose its theories upon business, that such regular manner of doing business is unquestionably lawful. To say that it is unlawful is to say that grocer A on the south side of the street, who keeps fully informed regarding the business of grocer B on the north side of it, violates the law, when, absent any agreement between them, he sells his groceries at prices which are the same as those at which grocer B sells his groceries. Merely to state such a case is to show the absurdity of any claim to the contrary.

We believe that the following extract from the decision of the District Court in *United States* v. *American Linseed Co., et al.*, 275 Fed. 939 (N. D. Ill., 1921), *rev'd on other grounds* (262 U. S. 371), is an accurate statement of the essence of competition (275 Fed., at p. 942):

> ". . . Every producer or merchant desires to obtain for his goods the highest price he can get. The price which he charges is always the highest which he believes the traffic will bear. He cannot charge, ordinarily, more than his competitors. His competitors' price fixes the point above which he cannot go. When the merchant fixes the price at the level of his competitors, he is fixing it in competition with his rival just as much as though he had named a lower price. The competition of his rival has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors, he will naturally lower the price, and this will establish a new level. This is the essence of what constitutes competition."

So, in *United States* v. *Standard Oil Co. of New Jersey, et al.*, 47 F. (2d) 288, at pp. 316-17 (E. D. Mo., 1931), the court said:

> ". . . Grocers, butchers, and all other lines in the same markets generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices. . . ."

Accordingly, while the preamble to Paragraph V of the Order contains what purports to be a limitation upon the applicability of the prohibitions contained in the lettered subparagraphs of that paragraph, such purported limitation is, for the reasons stated above, as a practical matter meaningless and may properly be disregarded in analyzing the nature and scope of the prohibitions of the Order.

The first practice prohibited by Paragraph V of the Order as an unfair method of competition is:

> "(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system."

That prohibition is clear and unambiguous. It prohibits the use by each petitioner of any basing-point method of quoting or selling conduit at delivered prices, whether the basing point is the point of shipment or elsewhere. This subparagraph alone, however, does not prohibit sales at delivered prices quoted by a method other than the basing-point method.

The second practice prohibited by Paragraph V of the Order as an unfair method of competition is:

> "(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a

> transportation charge factor from, any point other than the actual shipping point."

Excluding the words "or systematically equivalent to", this subparagraph prohibits each petitioner from quoting or selling conduit by the basing-point method of pricing at prices based upon any point other than the actual shipping point; and, to that extent, is partially duplicative of subparagraph (a). The meaning of the words "or systematically equivalent to" is uncertain, but their inclusion in the subparagraph is presumably intended to prohibit each petitioner from quoting or selling conduit by any method at prices which shall be equal to the prices that would be quoted by using the basing-point method of pricing based upon any point other than the point of shipment.

The third practice prohibited by Paragraph V of the Order as an unfair method of competition is:

> "(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination."

While the prohibition of that subparagraph against any pricing policy under which delivered prices regularly "reflect" the inclusion of a transportation factor either greater or less than the actual cost of transportation would include the use of the basing-point method of pricing based upon any point other than the point of shipment, it is presumably not intended to be limited to that practice, which is separately prohibited by subparagraph (b). The meaning of subparagraph (c) can best be considered in conjunction with the final subparagraph, which prohibits, as an unfair method of competition,

> "(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchaser from differently located respondents."

The concluding clause of that subparagraph, beginning with the words "and which mill nets" is, of course, merely a restatement of the "limitation" contained in the preamble and does not constitute an additional qualification of the prohibition stated in the first clause of the subparagraph.

Under subparagraph (d), each petitioner is prohibited from quoting or selling conduit on any price basis, whether a delivered price or an f.o.b. mill price, where the mill net return to the seller regularly varies according to the location of purchasers. Manifestly, in order that the mill net return to the seller shall not vary according to the location of purchasers, each petitioner must establish a mill price for his product and sell exclusively on a mill price basis at that price (either f.o.b. mill or at a delivered price equal to the sum of the mill price and the actual cost of transportation from mill to the point of delivery).*

Furthermore, not only is each petitioner required to sell on a mill price basis, but it may not, even in good faith for the purpose of meeting the lower price of a competitor, regu-

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*It will be noted that subparagraph (d) goes so far as to prohibit, as an unfair method of competition, the quoting or selling of conduit by each petitioner at a delivered price uniform at all points of delivery, since under that method of pricing the mill net return to the seller would differ according to the location of the purchasers.

larly or systematically reduce its delivered price, made up on that basis, on sales to purchasers of conduit who are located in markets in which such price is higher than the delivered price there of another conduit seller, even though such purchasers are not in competition in the sale of conduit as among themselves. In other words, in so far as concerns the regular conduct of its business, each petitioner is prohibited from competing for business in such markets.*

By Paragraph V of the Order, therefore, each petitioner is required to restrict its sales to that geographical area in which its mill price plus freight to the point of delivery will produce a delivered price not greater than the delivered price, similarly calculated, of another conduit seller. While the precise location of the boundaries of such geographical area will be affected not only by freight rates but by the mill prices established by the several conduit sellers, the record does not disclose any substantial difference in costs of manufacture at the several locations of conduit plants and it may properly be assumed, therefore, that, if Paragraph V shall be affirmed by this Court, the restricted area that will thereby be created for each conduit seller will be that area which will comprise all points to which the freight rate from such conduit seller's plant is not greater than the freight rate from the plant of any other conduit seller—*i.e.*, the area described in the Commission's findings

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*The effect upon competition of a requirement that a manufacturer sell only on a mill price basis has been graphically illustrated by the experience of A. E. Staley Manufacturing Co., the respondent in *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746 (1945). See statement by E. K. Scheiter at the Hearings before the Senate Trade Policies Committee on November 17, 1948 (Sen. Com. Pr. II, pp. 614-15).

See also Senate Trade Policies Committee Interim Report (pp. 9-17).

as the "natural freight-advantage territory" of each conduit seller (R. 3540, 3541).

That the enforcement of Paragraph V of the Order would create in this country a series of regional monopolies is clear for two reasons: First, a producer within its own "natural freight advantage" territory would be protected from outside competition by the freight rate barrier; and, secondly, the same barrier would prevent such producer from selling outside its own territory. Such regional monopolies would not be the result of the natural operation of the laws of supply and demand, and would not be the result of any act or wish of the buyers and sellers concerned. If the sellers of conduit had entered into an agreement to accomplish the results which would be imposed by the enforcement of Paragraph V the Order in this case, such agreement would unquestionably, and properly, have been branded by the Commission and by the courts as a gross violation of the anti-trust laws.

The regional monopolies in the conduit industry that would be created by the enforcement of Paragraph V of the Order are shown on the map which is attached hereto as an appendix. In preparing that map, the "freight advantage territory" of each of the several conduit manufacturers has been determined by reference to the current published freight rates. It shows that Walker Brothers*, located at Conshohocken, Pennsylvania, has a freight advantage in the territory that extends along the East Coast from Maine to Florida, including the heavily industrialized cities of New England and the Middle Atlantic States, and also (by reason of its rail-water freight advantage) in the territory

*Walker Brothers, a party to the proceedings below, is not a petitioner before this Court.

along the West Coast, including all the major West Coast cities; that Laclede Steel Company has a freight advantage in all the south central States from Georgia to New Mexico and from Nebraska to the Mexican border; that the Indiana Harbor plant of The Youngstown Sheet and Tube Company has a freight advantage in an area consisting of the States of Montana, North Dakota, South Dakota, Minnesota, Wisconsin, Michigan (except Detroit and vicinity), in portions of Illinois (including Chicago and vicinity), in most of Indiana, Iowa and Wyoming and in small portions of Kentucky and Ohio; that the Struthers, Ohio, plant of The Youngstown Sheet and Tube Company has a freight advantage in an area consisting of western New York, a portion of western Pennsylvania, northern Ohio, and that portion of Michigan including Detroit and its immediate vicinity; and that the entire balance of the industry, comprising the six plants located in or near Pittsburgh, have a freight advantage in only a relatively small area consisting of western Pennsylvania, West Virginia, southern Ohio and portions of Kentucky, Maryland, Virginia and Tennessee.

The economic consequences which would follow the enforcement of Paragraph V of the Order are staggering. Theoretically, of course, each petitioner might have a market for its products within the area in which it has a freight advantage. As a practical matter, however, in most cases a manufacturer cannot long survive, if the marketing of its products is limited to that area. In the present case, an acute problem of survival confronts the six conduit manufacturers located in or near Pittsburgh. Manifestly, the limited area in which those manufacturers have a freight advantage over their competitors to the west and to the east

could not provide an adequate market for the products of all such manufacturers, and, in order for them to compete for the business on the eastern seaboard and in the far west, a major relocation of manufacturing facilities in the conduit industry would be required. There is, however, nothing in the record to suggest that the market for conduit is such as to justify such relocation of manufacturing facilities. On the contrary, the record discloses that the total demand for conduit under normal conditions is only about 125,000 tons per year (R. 3447). Moreover, not only is the total demand for conduit small, but since, as stated above, the use of conduit is practically confined to building construction, the total demand for conduit varies with fluctuations in building activity (R. 1421-22, 1708, 1773, 1897, 2035-36, 2400). The variations in building activity in one location, and hence the demand for conduit in that location, do not generally correspond either seasonally or cyclically with similar variations in other locations (R. 1421-22, 1897). Consequently, the effect of the Order will inevitably be to put some of the petitioners out of business.

Furthermore, if this Court should affirm the enforcement of the Commission's Order, widespread and destructive dislocation of existing capital investments in the conduit industry would result and the law thereby declared would have like effect in all other industries where the cost of delivery represents a significant portion of the total cost of the product to the purchaser.*

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*In reporting in favor of a bill to provide a two-year moratorium with respect to the application of the anti-trust laws to individual, good faith delivered-price systems and freight absorption practices (H. R. 2222), the Judiciary Committee of the House of Representatives stated (H. R. Report No. 210, 81st Cong., 1st Sess. 2, March 4, 1949):

The heavy industries of the United States have, generally speaking, grown up at points where available raw material, fuel, power and transportation to markets, all combine to give the lowest costs at the point of delivery. Because they have been able to distribute their products on a nation-wide basis, such industries have been able to employ mass-production methods which have become world famous, and which have made possible low prices and the rapid introduction throughout the country of products reflecting inventions and improvements in manufacturing.

But Paragraph V of the Order would make freight rates to markets on finished products the sole determining factor in the location of new plants, and would have a disruptive and catastrophic effect on existing heavy industries generally of such magnitude that it cannot be estimated with anything like accuracy.

The Commission did not attempt to explain to the court below (and it apparently did not make any attempt to understand or appraise for itself)* the economic results, not only

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"Strict application of what many conceive to be the true meaning of the Cement decision might necessitate a violent and sudden relocation of many industries throughout the country. The impact upon the Nation's economy would be serious. The specter of ghost towns, which even now haunts many areas of concentrated cement production, might be a common sight throughout the land."

*In connection with the frequently-stated judicial assumption that the members of the Federal Trade Commission possess unique qualifications to pass upon questions affecting the preservation of a competitive economy (see, *e.g.*, the *Cement* case, 333 U. S. 726-27), it is of interest to note that in his testimony on June 2, 1948, before the Senate Trade Policies Committee, Ewin L. Davis, a member of the Federal Trade Commission, made the following remarks:

to the conduit industry but to industry generally, of the adoption of its "natural freight advantage" theory and the outlawing, pursuant to that theory, of pricing methods such as the basing-point method of quoting and selling conduit.

The result imposed by Paragraph V of the Order is not only not justified by Section 5 of the Federal Trade Commission Act; it is in direct conflict with the theory of free competition underlying all of the anti-trust laws.

2. The Commission Has Not Charged or Found, and the Record Does Not Contain any Evidence of any Discrimination in Price Unlawful Under Section 2 of the Clayton Act.

The existence of an unlawful discrimination in price as between different purchasers depends, under Section 2 of the Clayton Act, not upon the use of any given method of quoting prices, but upon the facts with respect to the prices actually charged, the cost of manufacture, sale or delivery, and competitive conditions. In the present case, however, there is not any charge or finding that there has been any discrimination in price by any of the petitioners, individually

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"But, gentlemen, I want to suggest this: That while we Commissioners, of course, after having served for 12 or 15 years on the Commission, and dealing with these things constantly, have more or less information and opinions on these matters, we have attorneys who have devoted all their time; we have devoted part of our time to particular cases. We have here attorneys, including Mr. Wooden, who tried the *Cement* case, and all these other basing point cases, and Mr. MacIntyre, and also our general counsel. They have been studying these problems for years.

"These men are more familiar with them than anybody in the world. They know every angle of them, and I really think that they could come nearer answering your questions which you have bothering you than any of us Commissioners." (Sen. Com. Pr. I, p. 25.)

or collectively, violative of Section 2 of the Clayton Act. As the Commission said in its brief before the court below (p. 23):

> "It cannot be too strongly emphasized that there is no charge and no finding and therefore can be no issue as to whether there has been any discrimination in price violative of Section 2(a) of the Clayton Act, as amended."

This case is, therefore, very different from the cases of *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945) and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746 (1945), in each of which the complaint charged a violation of Section 2 of the Clayton Act.

3. In the Absence of Unlawful Price Discrimination under Section 2 of the Clayton Act the Use of the Basing-Point Method of Quoting Prices is Lawful.

In condemning as unfair methods of competition, irrespective of conspiracy, the practices prohibited by Paragraph V of the Order, the Commission professes to "find" that such practices adversely affect competition in two respects (R. 3543):

(1) That their tendency and effect is "to hinder, lessen and restrain competition in price", to create in each user "a dangerous tendency toward a monopolistic control over price" and "to deprive purchasers of the benefits of competition in price"; and

(2) That their tendency and effect is "to unfairly discriminate among purchasers".

It is submitted that the practices prohibited by Paragraph V of the Order do not adversely affect competition in either respect.

(a) The Use of the Basing-Point Method of Pricing Does Not "Produce" Uniformity of Price.

In the court below, counsel for the Commission characterized as the "primary issue" under Count II the basing-point method's "inherent effect in the creation of identical delivered prices through concurrent use" (Com. Br. p. 78).

While, as the Commission has recognized (R. 3394-5), absolute uniformity in conduit prices has not prevailed, and the record contains substantial evidence that sales of conduit have frequently been made at other than announced prices, it is, as we have stated above, inevitable that, under any method of pricing, there will be at any given market substantial uniformity of prices for conduit just as there will be of any other standardized article. There cannot be room for doubt that, in the absence of abnormal conditions of supply and demand, every seller of a standardized commodity such as conduit must, in order to sell conduit in any given market, meet the competition in that market by meeting its competitors' price. One seller may, of course, create a momentary differential by quoting a price lower or higher than the current market price; but so long as competition for business continues, each seller must ultimately meet the lowest price of any competitor.

We are not here concerned with any charge of combination or conspiracy to fix prices and, therefore, it would not serve any useful purpose to discuss the question whether, under such circumstances, any inference of collusion could properly be drawn from mere uniformity of prices. For present purposes, it is sufficient to point out that uniformity

of delivered price is not "produced" by the use of any *method* of pricing; it is produced by the fact that all sellers in a given market normally quote the same delivered price, whether the method of quoting that price be the basing-point method or any other method of price quotation. Uniformity of price, either basing-point price or price at destination, may or may not result from illegal conduct; but the use of the basing-point method has no more tendency toward such uniformity than has the use, for the purpose of arriving at a price quotation, of standard methods of accounting to determine production costs, or of the United States dollar as the medium of exchange.

To state that the meeting of a competitive price in any given market, by the basing-point method or any other delivered-price method of pricing, adversely affects competition is to state a contradiction in terms. In so far as concerns the competition among sellers, such meeting of competitive price *is* competition; and while the Commission has not made any findings with respect to the effects upon competition among purchasers of the practices prohibited by the Commission, it is obvious that there cannot be an adverse effect upon such competition when all buyers in a given market are placed on an equality each with the others.

The Commission has not thus far explained the manner in which it has arrived at the conclusion that the use of the basing-point method of pricing, in the absence of an agreement, combination or conspiracy among competitors, is injurious to competition. Its Associate General Counsel, however, at the Hearings before the Senate Trade Policies Committee testified (Sen. Com. Pr. II, p. 249, November 11, 1948):

> "Senator McMahon. Mr. Wooden, as I see it, what you are really contending for is this: As a

> matter of administrative practice, if you find the basing-point theory being used, basing-point price being used, which results in uniform prices, then, in your mind, there is a presumption that that is injurious to competition, is that true?
>
> "Mr. Wooden. That is right. I will start with that as a presumption."

That "presumption", however, is without support in fact or in law. That that is so was recognized by another of the counsel for the Commission,* whose statement before the Senate Trade Policies Committee included the following (Sen. Com. Pr. II, p. 114, November 10, 1948):

> "There is an additional feature of the conduit order that disturbs me. The order assumes that suppression of competition is the inevitable result of matched prices. It prohibits systematic matching of prices and not suppression of competition as do most of the Federal Trade Commission orders. Matched prices can result from competition.
>
> "As an employee of the Federal Trade Commission and as one who is active in antitrust work, my principal concern with the conduit order is that it prohibits potential competition. It is not sufficiently limited so as to stop only unfair competition. It seems to be having the practical effect of requiring sellers to sell exclusively f. o. b. mill."

As we have stated above, manufacturers of conduit must, in order to stay in business, be able to meet their competitors' prices in each market for conduit. It is not and cannot be the law that only the first seller to enter a given market has the privilege of fixing the price at which he will offer his product for sale at that market, and that each

*Lynn C. Paulson, Assistant Chief Trial Counsel.

other manufacturer who desires to sell there is precluded from doing so except at prices different from the prices of his competitor or competitors.

(b) The Fact that a Conduit Purchaser May Not Receive a Price Advantage Because of His Proximity to a Point of Production Does Not Adversely Affect Competition.

The "discrimination among purchasers" of which the Commission complains is not, as we have shown, price discrimination which is unlawful under Section 2 of the Clayton Act, but is the Commission's own theoretical brand of "discrimination", *i.e.*, variations in the seller's mill nets by reason of the fact that sales are made in markets in which one conduit seller has a freight advantage over another conduit seller and the latter must shrink its mill net, if it is to sell its products in such markets in competition with the former. Thus, in Paragraph SEVENTEEN of its findings, the Commission found that "The use by respondent conduit sellers of the pricing formula heretofore described requires each such seller to discriminate among purchasers of conduit by charging some more than others for similar goods . . ." (Subparagraph (a), R. 3539); that "A conduit seller whose mill is not located at a basing point charges fictitious delivery costs to purchasers . . . where he has a freight advantage as compared with mills located at the controlling basing point . . .", and "shrinks his mill net below the controlling base price [*i.e.*, reduces his delivered price] on sales at destinations where he is at a freight disadvantage . . ." (Subparagraph (b), R. 3539-40); and that "In the case of a seller whose plant is located at a basing point . . . when such a seller quotes at destinations controlled by another base, he shrinks his mill net [*i.e.*, reduces his delivered price] . . ." (Subparagraph (c), R. 3540).

The Commission has not made any attempt to define the competition which it deems to be injuriously affected by variations in the seller's mill nets.*

While admitting that there is not any issue with respect to price discrimination under Section 2 of the Clayton Act, the Commission asserted before the court below (Br. p. 77) the novel proposition that price differences, not unlawful under that Section, may nevertheless be unlawful as an unfair method of competition under Section 5 of the Federal Trade Commission Act. That proposition, however, is manifestly untenable for the reason that the Congress has, by Section 2 of the Clayton Act, legislated in the specific field of price discrimination and has not left any room for the Commission, under the guise of "interpretation" of the term "unfair methods of competition" as it is used in Section 5 of the Federal Trade Commission Act, to find unlawful any differences in price as between purchasers from a given seller which are lawful at common law and not prohibited by the Congress.

Indeed, the legislative history of the Robinson-Patman Act, and the consistent refusal of the Congress to enact an anti-basing-point law (see, *e.g.*, the so-called Wheeler Anti-Basing-Point Bill (S. 4055, 74th Cong., 2d Sess., 1936), *Hearings Before Senate Committee on Interstate Commerce on S. 4055*, 74th Cong., 2d Sess. 325 (1936), THE BASING POINT PROBLEM 140 (TNEC Monograph 42, 1941), *Hearings Before TNEC*, 76th Cong., 3d Sess. 14329

*In this connection, it is significant that the Commission did not allege or make any findings with respect either to the existence of competition among buyers or to the effect upon buyers of any of the practices complained of, nor did it produce a single buyer witness to testify concerning the effect upon buyers of such practices.

(1940)), clearly show that the Congress has been unwilling to outlaw the basing-point method of pricing.

The Bill (H. R. 8442, 74th Congress) which, after revision, became the Robinson-Patman Act, as reported by the House Judiciary Committee (H. R. Rep. No. 2287, 74th Cong., 2d Sess. 2 (1936)), contained the following proposed definition of "price", which is the same as the "mill net" definition of price advanced by the Commission in the present case:

> "(5) That the word 'price', as used in this section 2, shall be construed to mean the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The purpose of that proposed provision was thus stated by such Committee at page 14 of its Report:

> ". . . In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities. It will require the use of the f.o.b. method of sale."

Thereafter, while the Bill was under debate in the House, the Committee itself recommended that the Bill be amended by striking out the proposed "mill net" definition of price (80 Cong. Rec. 8223 (1936)). That recommendation was unanimously adopted by the House, and such provision was stricken from the Bill (80 Cong. Rec. 8140, 8224 (1936)).*

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*For a more detailed "History of F.O.B. Mill Pricing and the Activities of the Federal Trade Commission in That Direction", see Senate Trade Policies Committee Interim Report (pp. 36-45).

That this Court is fully aware of that action of the Congress with reference to the "mill net" definition of price is shown by the following extract from its opinion in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 737 (1945):

> "Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a) [of the Clayton Act], as enacted, and its more restricted prohibitions of discriminations in delivered prices." (Emphasis supplied.)

It is not even claimed, however, that the basing-point method of pricing used by the petitioners is "within the reach" of Section 2 of the Clayton Act. The Commission and the court below completely disregarded that pronouncement of this Court in the *Corn Products* case that the legality of any price discrimination resulting from the use of a basing-point method of pricing is to be determined under the "more restricted prohibitions of discriminations in delivered prices" which the Congress in 1936 imposed by the Robinson-Patman Act, and have, instead, declared that the petitioners' pricing method is unlawful under a prior statu-

tory prohibition against "unfair methods of competition" which was enacted in 1914.

In substance, the Commission and the court below have imposed the economic theory of the Commission upon the conduit industry in total disregard of the fact that the Congress had specifically rejected that theory. But it is axiomatic that the legislative power resides in the Congress and not in the Commission or the courts, and that it is for the Congress to determine the public policy of the United States. Except as otherwise declared by statute, public policy is to be derived from the principles of the common law. When the Congress has acted upon a subject matter within the scope of its legislative power, public policy then becomes that which the Congress has declared it to be. Neither the courts nor administrative commissions are empowered to declare the public policy of the United States on matters within the legislative field in which the Congress has either acted or refused to act. *License Tax Cases,* 5 Wall. 462, 469 (U. S. 1866); *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340 (1897); *Baker* v. *United States,* 27 F. (2d) 863, 875 (C. C. A. 1st), *cert. den.* 278 U. S. 656 (1929).

The suggestion that Section 5 of the Federal Trade Commission Act, by empowering the Commission to prohibit "unfair methods of competition" authorized the Commission to regulate price policies has been specifically rejected. *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307 (C. C. A. 7th, 1919). In that case, in holding that the Commission was not authorized to prohibit Sears, Roebuck & Co. from selling a product below cost, the Court said (p. 312):

> "We find in the statute [Federal Trade Commission Act] no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

That at common law sellers had the right to sell at delivered prices, to meet competition wherever it existed and, in the exercise of such right, to employ the basing-point method of quoting delivered prices, cannot reasonably be doubted.

Thus, at common law:

> "The trader or manufacturer . . . carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses and he may cease to do any business whenever his choice lies in that direction . . . .
>
> "The [railroad] company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things." (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320-21, 322 (1897))

Manufacturers or traders can be deprived of those rights only by Congressional action. Neither the Commission nor the courts have authority to regiment the nation's business or to control the methods of its conduct, in accordance with such economic theories as may be entertained by the Com-

mission, unless the methods which it seeks to have condemned are prohibited by statute.

In his dissenting opinion in the *Cement* case, Mr. Justice Burton, emphasized the fact that the majority of this Court had not passed upon the validity, apart from conspiracy, of "the long-established and widespread practice by individuals of bona fide competition by freight absorption", and said (333 U. S., at pp. 738-39):

> ". . . This is the field where a producer, for his own purposes and without collusion, often ships his product to a customer who, in terms of freight charges, is located nearer to one or more of the producer's competitors than to the producer himself. In selling to such a customer, this producer is at an obvious freight disadvantage. To meet the lower delivered-price of his competitor, the producer, therefore, reduces his delivered-price in that area by a sum sufficient to absorb his freight disadvantage. He might do this for many reasons. For example, this customer might be such a large customer that the volume of his orders would yield such a return to the producer that the producer, by distributing his fixed charges over the resultingly increased volume of business, could absorb the freight differential without loss of profit to his business as a whole and without raising any charges to his other customers. The securing of this particular business might even enable the producer to reduce his own basic factory price to all his customers. It might make the difference between a profitable and a losing business, resulting in the producer's solvency or bankruptcy. If the advantage to be derived from this customer's business were not sufficient, in itself, thus completely to absorb the freight differential, the producer might absorb all or part of such differential by a reduction

> in his net earnings without affecting his other customers. . . ."

As shown above, the Congress has not prohibited the use of the method of pricing which is here under consideration. On the contrary, by expressly refusing so to amend Section 2 of the Clayton Act as to prohibit, in terms, the use of the basing-point method of quoting delivered prices in accordance with the provisions of the Robinson-Patman Bill as first reported to the House, the Congress gave its sanction to its continued use, subject only to the specific prohibition against price discrimination contained in Section 2 of the Clayton Act.

The decision of the court below under Count II of the complaint in this case was the first ruling by any court that the independent use of the basing-point method of pricing, in the absence of conspiracy and of unlawful price discrimination, is illegal. The Commission has never claimed that any court, prior to the present case, had ever made any such ruling, and, indeed, as stated above, the Commission characterized its theory of Count II of the complaint in this case as "novel and far reaching".

In upholding the Commission's contention in the present case, the court below apparently regarded as applicable the dictum* of this Court in the *Cement* case (333 U. S., at p. 708) which it quoted, in part, as follows (168 F. (2d), at p. 181):

> ". . . individual conduct, . . . which falls short of being a Sherman Act violation may as a matter of

*In view of the charge and finding of combination and conspiracy on both counts of the complaint in the *Cement* case, any reference to "individual" conduct was necessarily *obiter dictum.*

> law constitute an 'unfair method of competition' prohibited by the Trade Commission Act."

The court below did not state in what manner it regarded that dictum as applicable to Paragraph V of the Order in this case, but, in view of the fact that there is not any question here concerning the application of the Sherman Act, we assume that the court below understood that the quoted dictum could properly be restated, in terms of this case, as

> "individual conduct . . . which falls short of a violation of 'Section 2 of the Clayton Act' may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act"

and, as so restated, to mean that price discrimination not violative of Section 2 of the Clayton Act may nevertheless be held to violate Section 5 of the Federal Trade Commission Act. If that was, in fact, the reasoning of the court below, it entirely misses the point that we are here making.

As an abstract proposition, of course, there can be no doubt that a wide variety of conduct which "falls short of" a violation either of the Sherman Act or of the Clayton Act may constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act. Indeed, by far the greater number of the practices condemned as "unfair methods of competition" under said Section 5 (such as false advertising, incorrect branding, unlawful use of name, etc.) do not involve either the Sherman Act or the Clayton Act. It does not follow, however, that the Commission is empowered to prohibit, as an unfair method of competition, any conduct that it chooses to

prohibit. As the Court stated in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427 (1920):

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

All of the cases that have been cited in support of the proposition that individual acts may constitute unfair methods of competition were cases involving some immoral, deceptive or coercive conduct. Thus, in *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), the practice prohibited was a lottery device used in connection with the sale of candy to children. *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441 (1922) involved a merchandising policy directed at the maintenance of resale prices, which merchandising policy was found to have been enforced by coercive tactics, carried out with the cooperation of the company's distributors, customers and special agents.

It is not to be doubted that, in the absence of specific legislation, there is wide room for interpretation of the term "unfair methods of competition". Where, however, the practices under consideration are attacked as against

public policy in a field in which the Congress has specifically legislated, the specific legislation is determinative of the public policy involved.* Our point is that in the specific field of price discrimination, the Congress has authoritatively declared the applicable public policy which may not be frustrated by the device of giving a new "interpretation" to a previously existing statute.

Of course, if this case involved price discrimination unlawful under Section 2 of the Clayton Act and such price discrimination were asserted as a violation of Section 5 of the Federal Trade Commission Act, the question involved would be analogous to that considered by this Court in the

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*In *Federal Trade Commission* v. *Beech-Nut Packing Company, supra,* cited by the Commission in the court below, this Court took cognizance of the rule that in determining what is and what is not against public policy in cases involving conduct attacked as being in restraint of trade, the applicable specific antitrust legislation, as interpreted by the courts, is controlling. Thus, the Court said (p. 454):

> "If the 'Beech-Nut System of Merchandising' is against public policy because of its 'dangerous tendency unduly to hinder competition or create monopoly,' it was within the power of the Commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer."

While the Court found that the Beech-Nut system involved unfair methods of competition, it declined to uphold the Commission's order in so far as it was directed against individual action of a character held in the *Colgate* case (*United States* v. *Colgate & Company,* 250 U. S. 300 (1919)) to be within the legal right of the producer, and restricted the relief granted to an injunction against carrying the merchandising policy into effect "by cooperative methods" (257 U. S., at pp. 455-56).

Cement case with reference to Count I of the complaint in that case, where the Court stated that conduct violative of Section 1 of the Sherman Act could also constitute a violation of Section 5 of the Federal Trade Commission Act (333 U. S. at p. 693). But in this case it is not claimed that there was any price discrimination in violation of Section 2 of the Clayton Act, and the findings of the Commission here do not include the findings which were made in the *Cement* case (and which would be essential to establish a violation of Section 2 of the Clayton Act) that differences in the prices at which a petitioner sold its product to two or more of its customers were not justified under the pertinent provisions of the Clayton Act.

4. The Prohibitions of Paragraph V of the Order Cannot Be Justified as "Relief" Incidental to the Provisions of the Order Relating to Combination and Conspiracy.

The Solicitor General has intimated* that the Commission will contend before this Court that the prohibitions of Paragraph V of the Commission's Order "might be properly letermined by the Commission to be relief appropriate and necessary to dissipate the effects of the illegal combination charged in Count I and found by the Commission." That suggestion is completely negatived by the record.

Count II of the complaint alleges a violation of Section 5 of the Federal Trade Commission Act separate and distinct from the violation alleged in Count I. As stated above, Count II of the complaint does not allege that there was any agreement, combination or conspiracy among the respondents, but alleges violation of Section 5 of the Federal Trade

*Memorandum for the Federal Trade Commission, filed herein by the Solicitor General on January 17, 1949, p. 4.

Commission Act without any reference to an agreement, combination or conspiracy.

Furthermore, in its findings, the Commission referred specifically to Count II of the complaint and concluded, with reference to that Count, that the acts and practices therein complained of constitute unfair methods of competition (R. 3543). Such findings do not include any finding that the prohibition of the independent use of the basing-point method of pricing is necessary to dissipate the effects of the conspiracy alleged in Count I of the complaint, although a finding to that effect would have been essential in order to support, on that theory, a prohibition of conduct lawful in and of itself.

Finally, the Order itself establishes that Paragraph V was issued solely under Count II of the complaint. Paragraph VI directs the dismissal of Count II as to one of the respondents therein named, *i.e.*, General Electric Supply Corporation (R. 3548), thereby confirming the fact that Count II had been upheld as to the remaining respondents. Of controlling significance, however, are the facts that the Commission dismissed Count I of the complaint as to petitioner Spang Chalfant, Inc., and as to Clifton Conduit Company (R. 3548), thereby determining that those respondents were not parties to the conspiracy alleged in Count I; and that the Commission, notwithstanding that determination, prohibited those respondents from doing the things described in subparagraphs (a) to (d), inclusive, of Paragraph V of the Order.

Indeed, the Commission has heretofore frankly conceded that Paragraph V of the Order was based upon Count II of the complaint and not upon Count I. Thus, in the Commission's brief in the court below, counsel for the Commis-

sion stated (pp. 63, 64) that "The findings of fact which underlie this part of the order [*i.e.*, Paragraph V] are contained chiefly in Paragraph Eighteen of the findings (R. 3541). . . .", and, after summarizing Paragraph Eighteen of the findings (which, as stated above, deals with the Commission's "natural freight-advantage territory" theory); that "Count II does not rest upon agreement or combination"; and that

> "Count II and a corresponding part of the order are frankly directed against the basing point practice as being, per se, an unfair method of competition, even though not predicated on combination and conspiracy. . . ."

Prior to the above-mentioned hearings before the Senate Trade Policies Committee, the Commission consistently stated, in its public announcements, that Paragraph V of its Order prohibited the use of the basing-point method of pricing as an unfair method of competition, *per se*, irrespective of conspiracy. Thus, immediately following the issuance of the Order in this case, the Commission issued to the press "For Release in MORNING NEWSPAPERS, Saturday, June 10, 1944" a statement that the Order "directs each of such respondents, irrespective of combination or conspiracy, to cease and desist from" the practices specified in subparagraphs (a) through (d) of Paragraph V; and seven days after the decision by the court below in this case, the Commission issued to the press "For immediate Release, Wednesday, May 19, 1948", a statement to the same effect, which bore the headline "Court Holds Basing-Point Method of Pricing to Be 'Unfair' Irrespective of Conspiracy".

After the public response to those announcements and to the facts developed at the hearings before the Senate

Trade Policies Committee had brought home to the Commission at least a partial realization of the disruptive effects upon the business of the country that would result from the enforcement of the theory of the Commission embodied in Paragraph V of the Order, the Commission thought it expedient to attempt publicly to justify Paragraph V of the Order as "relief" incidental to a finding of conspiracy. Faced with the obvious difficulty that Count II of the complaint did not contain any allegations of combination or conspiracy and the further difficulty that the Order was directed specifically against two respondents (Spang Chalfant, Inc. and Clifton Conduit Company) as to which the Count I charge of conspiracy had been dismissed, the Commission evolved an "official explanation" contained in a statement issued by it on October 12, 1948, and widely distributed, entitled "Notice to the Staff in re Commission Policy Toward Geographic Pricing Practices" (Sen. Com. Pr. II, pp. 473-79). That statement reads in part as follows (pp. 474-75):

> "In the Rigid Steel Conduit case, the Commission found, and the circuit court agreed, that adherence to an industry-wide basing point formula, with the knowledge that other concerns are adhering to it also, constitutes in itself a violation of the Federal Trade Commission Act by the individual adhering companies when price competition is thereby eliminated. It would have been possible to describe this state of facts as a price conspiracy on the principle that, when a number of enterprises follow a parallel course of action in the knowledge and contemplation of the fact that all are acting alike, they have, in effect, formed an agreement. Instead of phrasing its charge in this way, the Commission chose to rely on

> the obvious fact that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion, and, for this reason, the Commission treated the conscious parallelism of action as violation of the Federal Trade Commission Act. Should the Supreme Court sustain the Commission's view, the effect will be to simplify proof in basing point cases, but to expose to proceedings under the Federal Trade Commission Act only courses of action which might be regarded as collusive or destructive of price competition."

The foregoing "official explanation" of the Order in the *Conduit* case evidently emanated from the Commission's Chief Economist, who had previously stated*:

> "In one case involving Rigid Steel Conduit, the Commission had attacked a basing-point system under the Federal Commission Act by charging that the concerns in the industry are individually and separately in violation of the . . . Act in following this system. . . . The charge rests upon the assertion that each member of the industry employs the system in the knowledge of the fact that the other members have been and are employing it. Thus even this charge rests upon a concert of action which brings about an economic effect undistinguishable from the collusion which is also charged in the same complaint."

If by the newly-coined term "conscious parallelism", the Commission means to assert that independent action on the

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*Corwin D. Edwards, Director, Bureau of Industrial Economics of the Federal Trade Commission, Statement at Seminar for State Planning and Development Agencies, Department of Commerce (August 4, 1948), Sen. Com. Pr. II, p. 459.

part of individual members of an industry in using a long-established commercial practice is, when accompanied by knowledge that other members of the industry are likewise using it, equivalent to an agreement, combination or conspiracy among the members of the industry to use such practice, that assertion is patently absurd. Indeed, the Commission itself recognized, in its findings in this case, that (FF 17(e), R. 3541):

> "Aside from the conditions which have existed, it is inevitable that the use of such system by any conduit seller in quoting prices on conduit would come to the knowledge of the other conduit sellers through ordinary trade channels. As a practical matter, it would be impossible for one conduit seller to quote prices in accordance with the basing-point, delivered-price system and conceal that fact from the other conduit sellers."

If, however, the term "conscious parallelism" is used by the Commission merely as a catchword with sinister implications, to describe independent action among members of an industry without any agreement, combination or conspiracy, then the use of the term "conscious parallelism" is disingenuous and serves only to obscure the real issue.

That "official explanation" is clearly an afterthought; the stubborn fact remains that Paragraph V of the Order is not directed at any alleged combination or conspiracy, nor are its prohibitions even limited to "conscious parallelism of action".

As we have shown, the Commission, in imposing upon the petitioners the prohibitions contained in Paragraph V of the Order, did so upon the express ground that it regarded the prohibited practices as unfair methods of com-

petition; it did not act on the theory that it was prohibiting lawful commercial practices as "relief" necessary to dissipate the effects of an illegal conspiracy. If, however—contrary to the fact—it had acted on that theory, its action would have been arbitrary and not in accordance with law.

The Commission is not vested with any of the inherent powers of a court of equity. *Federal Trade Commission* v. *Eastman Kodak Company, et al.*, 274 U. S. 619 (1927); *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999 (C. C. A. 7th, 1939), *cert. den.* 308 U. S. 610. The sole power of the Commission under the Federal Trade Commission Act is

> "to prevent persons . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

In the *Eastman Kodak* case, this Court defined the authority of the Commission and the authority of a Circuit Court of Appeals in reviewing an order of the Commission, as follows (274 U. S., at 623):

> "The proceeding before the Commission was instituted under § 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of 'unfair methods of competition' in interstate and foreign commerce, and, if it finds that 'any unfair method of competition' is being used, to issue an order requiring the offender 'to cease and desist from using such method of competition.' The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc. Association* v. *Federal Trade Commission* (C. C.

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A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

Moreover, this Court has declared that the Commission does not have authority to interfere with ordinary business methods. Thus, in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U. S. 463 (1923), the Court said (p. 475):

> "The powers of the Commission are limited by the statutes [Federal Trade Commission Act and Clayton Act]. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

Even the power of the District Courts, in the exercise of their inherent equity jurisdiction, to enjoin practices

lawful in and of themselves is a very limited one. As this Court said in *Hartford-Empire Co. et al.* v. *United States,* 323 U. S. 386, 409:

> ". . . the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people' . . . ."*

The principle there stated is especially applicable to this case, in which the Commission has prohibited the use of long-established commercial practices by which manufacturers have been able to sell their products in distant markets by meeting the price of competitors in those markets. On the subject of judicial regulation of pricing policies, this Court, in *United States* v. *Bausch & Lomb Optical Co., et al.,* 321 U. S. 707 (1944), in rejecting the Government's contention that the Soft-Lite Lens Co. should be directed to file with the District Court "a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor", said (p. 728):

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices."

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*See also *Standard Oil Co. of New Jersey et al.* v. *United States,* 221 U. S. 1, 80 (1911); *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 404 (1906); *Sugar Institute, Inc., et al.* v. *United States,* 297 U. S. 553, 605 (1936).

Paragraph V of the Order of the Commission in this case goes far beyond those regulations of lawful business which courts of equity have imposed as incidental to relief in a few cases under the antitrust laws. Its enforcement by this Court would destroy—not merely regulate—a large part of the business of these petitioners.

That paragraph of the Order, therefore, cannot be upheld on the theory that the Commission may, as "relief" incidental to the enforcement of its Order under Count I of the complaint, prohibit the independent use by each petitioner of lawful commercial practices.

CONCLUSION

The practices prohibited by Paragraph V of the Order are practices which were lawful at common law. Such practices have not been prohibited by the Congress, although the Congress has, by Section 2 of the Clayton Act—violation of which is not charged by the Commission in this case—legislated in the specific field of price discrimination. The result imposed by Paragraph V of the Order is not only not required by an act of Congress; it is in direct conflict with the theory of free competition underlying all of the anti-trust laws.

The petitioners here are contending only for the preservation of their right—individually and without agreement—to continue to carry on their businesses in areas in which they have always been carried on; and for the right not to be excluded from those areas by artificial barriers erected by the Commission.

It is respectfully submitted that the decree of the court below should be reversed to the extent that such decree affirms Paragraph V of the Commission's Order.

Respectfully submitted,

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